

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

APR 25 2008

COURT OF APPEALS
DIVISION TWO

MARIA A.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY and
MELADIE A.,

Appellees.

2 CA-JV 2008-0007
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 16725700

Honorable Stephen M. Rubin, Judge Pro Tempore

AFFIRMED

Law Office of John C. Gilmore, Jr., P.C.
By John C. Gilmore, Jr.

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Michelle R. Nimmo

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

V Á S Q U E Z, Judge.

¶1 Maria A. appeals from the juvenile court's December 2007 order terminating her parental rights to Meladie A. pursuant to A.R.S. § 8-533(B)(10).¹ In the single issue raised on appeal, Maria contends the court erred by refusing to dismiss a motion to terminate her rights and instead proceeding to a contested severance hearing and ordering her parental rights terminated without first having held a permanency hearing as contemplated by A.R.S. § 8-862. Maria argues the court's actions violated § 8-862 and Rule 64(A), Ariz. R. P. Juv. Ct.

¶2 Born methamphetamine-exposed in May 2007, Meladie was taken into protective custody by Child Protective Services (CPS) at birth. She was adjudicated dependent in June 2007 based on Maria's admission to a dependency petition filed on May 10 by the Arizona Department of Economic Security (ADES). Among other allegations, the dependency petition alleged Maria had been involved with CPS since 2003 when her three oldest children were removed due to her substance-abuse issues and her parental rights to

¹Subsection (B)(10) of § 8-533 permits the termination of parental rights upon proof by clear and convincing evidence "[t]hat the parent has had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause," provided the court also finds by a preponderance of the evidence that terminating the parent's rights is in the child's best interests. See § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 42, 110 P.3d 1013, 1022 (2005).

her fourth child had also been terminated on grounds of abandonment and chronic substance abuse.²

¶3 After a contested severance hearing in November 2007, the juvenile court announced its ruling in a minute entry, from which we quote in pertinent part:

Meladie A[.] is the fifth child born to the mother in this case. She is the third child born exposed to drugs. . . . At the time of her birth, she tested positive for methamphetamines. The mother admitted to using methamphetamines during her pregnancy.

. . . .

The State has established by clear and convincing evidence that the mother's substance abuse prohibits her from parenting. There is clear and convincing evidence that the mother's condition will continue for a prolonged, indeterminate period. The most obvious evidence of this is that, while this case was pending, the mother continued to use drugs, as evidenced by the positive drug tests . . . [admitted] in evidence. The most recent positive test was 25 days before this trial began. The mother was offered residential substance abuse treatment and refused to participate.

It is undisputed that the mother's parental rights to [her fourth child] were terminated involuntarily by the court within two years for the same cause.

The evidence, cited by the court above, proved that the mother continues to be unable to parent due to the same cause.

²Maria's five children were born between June 2001 and May 2007. Her rights to the oldest three were terminated in 2005. She gave birth to her fourth child in November 2005, and her parental rights to him were terminated in February 2006.

The minor child is placed in the home of the paternal grandmother who has adopted all of her siblings. It is in the best interests of the minor child that the mother's rights be terminated so she may be adopted by her grandmother. It would be a substantial detriment to the child to deny the motion, in that she is in a safe and stable relative placement that is permanent and should not be disrupted. In addition, it is not in the child's best interest to be placed with a mother with this mother's history of substance abuse.

¶4 Maria does not challenge the sufficiency of the evidence to support the juvenile court's factual findings nor dispute its legal conclusions. Rather, she contends the court erred by proceeding to the contested termination hearing without first having held a permanency hearing. Citing § 8-862 and Rule 64(A), she argues ADES cannot properly move to terminate a parent's rights until the juvenile court has held a permanency hearing and ordered either the Department or counsel for the dependent child to file such a motion. Maria preserved these issues for appeal by filing below a motion to dismiss the Department's motion for termination, thus she also contends the court erred by denying her motion.³ She asks us to vacate the court's order terminating her parental rights until such time as a permanency hearing has been held. She does not, however, claim any prejudice resulted from the court's failure to hold a separate permanency hearing for Meladie; she alleges only procedural, not substantive, error.

³The court's minute entry denying the motion to dismiss states: "The Court's review of the pleadings, statutes and rules that apply to this matter finds there is no prohibition against filing a Motion for Termination of Parental Rights prior to a permanency hearing." The court therefore denied the motion to dismiss and allowed the termination proceedings to move forward.

¶5 As ADES notes in response, one of Maria’s assertions is refuted by A.R.S. § 8-864, entitled “Timing of motions and hearings; consolidation of hearings.” It provides:

Notwithstanding any other statute, the court may order *or permit* the filing of a motion for termination or permanent guardianship *before the permanency hearing is held*, consolidate hearings or provide for a different order of hearings if:

1. The permanency hearing is held no later than the time prescribed in [§] 8-862, subsection A.
2. The termination hearing is held no later than the time prescribed in § 8-862, subsection D, paragraph 2.
3. The permanent guardianship hearing is held no later than the time prescribed in § 8-862, subsection E, paragraph 2.

(Emphases added.)

¶6 Similarly, Rule 60, Ariz. R. P. Juv. Ct., provides in part:

A. Purpose. At the permanency hearing the court shall determine the future permanent legal status for the child and shall enter such orders as may be necessary to accomplish the plan within a specific time frame.

B. Consolidation of Hearings. On a motion of any party, or the court’s own motion, the court may order that a motion or petition to terminate parental rights or to establish a permanent guardianship be filed prior to the permanency hearing and may consolidate the permanency hearing and the initial termination or guardianship hearing, so long as the permanency hearing is held within twelve (12) months of the child’s removal and all of the following are true:

1. The child was removed from the custody of the parent, guardian or Indian custodian;

2. The parent, guardian or Indian custodian has been offered reunification services;

3. The child has not been returned to the parent, guardian or Indian custodian; and

4. A party is requesting the termination of parental rights or the establishment of a permanent guardianship.

In short, both § 8-862 and Rule 60(B) plainly permit the filing of a motion for termination before a permanency hearing is held, defeating Maria's contention to the contrary. The juvenile court did not err by rejecting her claim that the Department's motion for termination was premature and consequently denying her motion to dismiss the severance proceeding.

¶7 The less straightforward question Maria presents is whether the juvenile court erred by holding no permanency hearing at all before entertaining the Department's motion for termination and proceeding to the contested termination hearing. The applicable juvenile statutes and rules both clearly contemplate that proceedings to terminate parental rights will include a permanency hearing, *see, e.g.*, § 8-862; Ariz. R. P. Juv. Ct. 60, and ADES acknowledges "that no formal permanency hearing was held in this case." But Maria has cited no authority for the proposition that a formal permanency hearing must be held in all cases, particularly when the purpose for the hearing is otherwise fulfilled.

¶8 Maria contends the reason § 8-862 and Rule 60 provide for a permanency hearing is to permit the juvenile court, not ADES, to decide when a termination action should begin. Citing *Rita J. v. Arizona Department of Economic Security*, 196 Ariz. 512, ¶ 5, 1 P.3d 155, 156-57 (App. 2000), ADES counters that the purpose of a permanency

hearing is to insure compliance with the time requirement imposed by the federal Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997), “that states enact procedures for securing permanent placement of children in foster care within twelve months of their temporary placement.” *Rita J.*, 196 Ariz. 512, ¶ 5, 1 P.3d at 157. Rule 60(A) declares that the purpose of a permanency hearing is for the court to “determine the future permanent legal status for the child and . . . enter such orders as may be necessary to accomplish the plan within a specific time frame.”

¶9 In this particular case, it was an easier task than usual for the juvenile court to “determine the future permanent legal status” for Meladie because the court was already familiar with Maria and her long CPS history and because the same circumstances that resulted in the severance of her rights to Meladie’s four older siblings in 2005 and 2006 had simply persisted, necessitating similar proceedings when Maria gave birth to yet another child. Ariz. R. P. Juv. Ct. 60(A). As the court noted in its termination ruling, Meladie was the third of Maria’s children who had been exposed to drugs in utero; ADES had offered, and Maria had refused, residential substance abuse treatment; she had tested positive for drug use less than four weeks before trial began; and her drug abuse was the same underlying reason she had lost all rights to her four other children.

¶10 Presumably for those reasons, Maria’s case plan in Meladie’s case specified concurrent case plan goals of family reunification and severance and adoption. Presumably also for those reasons, at the June 25 status hearing at which it adjudicated Meladie

dependent, the juvenile court scheduled an initial severance hearing for August 1. At the initial severance hearing on that date, the court in turn scheduled the contested severance hearing for November 1, 2007.

¶11 As Maria's CPS case manager later testified at the contested severance hearing, by October 2007 Maria had three times missed the intake appointment that was the prerequisite for her to obtain the substance-abuse treatment that her case investigator, an evaluating psychologist, and Maria herself, all agreed she needed. Given Maria's lengthy history of substance abuse, her continued use of drugs several months into this dependency proceeding, and her sporadic participation in her case plan tasks even after she had formally admitted that Meladie, too, was a dependent child, the record abundantly supports the juvenile court's implicit finding that the appropriate permanent plan for Meladie was severance and adoption.

¶12 Although Maria moved to dismiss the termination proceeding on the ground that no permanency hearing had been held, she apparently never expressly asked the court to hold such a hearing. Instead, the relief requested in her motion was that the court "dismiss the Department's motion for termination of parental rights and find that the Department is not making reasonable efforts to re-unite the family." At the September 24 hearing on Maria's motion to dismiss, which the court combined with a dependency review hearing and initial severance hearing, the court instead found

that the Department has made reasonable efforts to implement the case plan goal of family reunification by offering services

such as case management services, substance abuse treatment, referrals to AFF, random drug screening, group and individual psychological testing, individual psychological evaluations, supervised visitation, individual counseling, Kinship Foster Care for the children, diaper and clothing allowances, special needs allowances, child care and CMDP.

¶13 Despite the court’s apparent failure to expressly order the case plan goal changed from a concurrent plan to one of severance only, the court had admonished both parents in person when it adjudicated Meladie dependent on June 25 and ordered, *inter alia*, that:

Reunification must be achieved within twelve months of the date of the child’s removal and if reunification does not occur within that time frame the Department may be ordered to change the permanency goal from reunification to a plan which does not include the parents, such as severance and adoption.

The Court has discretion to change the permanency goal sooner than the twelve month time frame if the parents fail to participate in the case plan tasks or if the parents do not benefit from the case plan services.

Moreover, after failing to request a permanency hearing below, on appeal Maria disputes neither the propriety of severance as a permanent plan for Meladie nor the sufficiency of the evidence proving that severance was legally justified. We agree with ADES that “any possible error in the court’s failure to hold a formal permanency hearing was harmless beyond a reasonable doubt.”

¶14 In sum, we will not disturb the juvenile court’s final order based on a purely procedural omission when Maria did not make a specific, timely request for a separate

permanency hearing below; when she has alleged no actual prejudice resulting from the court's failure to hold a formal permanency hearing; and when she has not demonstrated that any purpose would be served or the ultimate outcome of the termination proceeding changed were we to grant the relief she requests and order the juvenile court to hold a permanency hearing now. Accordingly, we affirm the court's order of December 17, 2007, terminating Maria's parental rights to Meladie.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge